Office - Supreme Court, U. S.
FILED
JUN 30 1950
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1950 49

No. 164

OLLIE B. ROBERTS,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS, TEXAS, AND BRIEF IN SUPPORT THEREOF.

WEBB & ROGERS,
Grayson County State Bk. Bg.,
Sherman, Texas,
Attorneys for Petitioner.

F. NEILSON ROGERS,
Of Counsel.

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — Harwood-9310

INDEX

	Page
Petition for Writ of Certiorari	1
Summary and Short Statement of the Matter Involved	2
Basis for Jurisdiction	7
Questions Presented	9
Reasons Relied Upon for Allowance of Writ	10
Conclusion	11
Appendix—Specifications of Error	13
Brief in Support of Petition for Writ of Certiorari	15
Opinion of Court Below	15
Ground of Jurisdiction	15
Concise Statement of the Case	15
Specification of Errors	16
Points Presented and Argument	16
Summary of Argument	16
Point No. 1—Error of the Court in reviewing the record in the light most favorable to respondent, contrary to the verdict of the jury and judgment of trial court	18
Point No. 2—Error of the Court in holding there was no evidence to support petitioner's claim	18
Argument under Points Nos. 1 and 2	18
Point No. 3—Error of the Court in holding the submission of Special Issues Nos. 5A, 5B, and 5C constituted a general submission, and thus denying petitioner relief	26
Point No. 4—Error of the Court in abolishing master's duty to adopt a reasonably safe method for the performance of work in the State of Texas	26
Argument under Points Nos. 3 and 4	26
Conclusion	34

Page

American Ry. Exp. Co. v. Levee, 68 L. Ed. 140, 263 U. S. 19, 44 S. Ct. Rep. 11 30

Bacon v. Texas, 163 U. S. 207, 41 L. Ed. 132, 16 Sup. Ct. 1023 6

Bailey v. Central Vermont R. Co., 87 L. Ed. 1444, at p. 1447; 319 U. S. 350, at p. 353 ..... 23, 30

Blair v. Baltimore & Ohio Railroad, 89 L. Ed. 490, at p. 494; 323 U. S. 600-606 ..... 8, 23, 32

Brown v. Western Ry. of Alabama, 70 S. Ct. 105; S. Ct. Reporter, Dec. 1, 1949, Law Ed. Advance Opinions, Vol. 94, Advance Sheet No. 2 ..... 9, 30

Chicago & N. W. R. Co. v. Grauel (Circuit Ct. App., Reh. den.), 160 Fed. 2d 820, pp. 825, 826 23

Clark v. Widmer Engineering Co. (St. Louis Ct. App., Mo.), (Reh. den.), 263 S. W. 500, at pp. 503, 504 27

Delevie v. Reading Co., 176 Fed. 2d 496 8

Ellis v. Union Pacific R. Co., 91 L. Ed. 572, at p. 576; 329 U. S. 649-653 ..... 23, 31

Galveston H. & S. A. Ry. Co. v. Contois, 279 S. W. 929, p. 932 (Civ. App.); Aff. by Comm. App., App. by Sup. Ct., 288 S. W. ~~2d~~ 154; writ of certiorari den., 274 U. S. 747, 71 L. Ed. 1328 27

Gordon Jones Const. Co. v. Lopez (Civ. App.), 172 S. W. 987, at p. 989 (Reversed on other grounds) 27

Grandstaff v. Wabash Ry. Co. (Kansas City Ct. App., Mo.), (Reh. den.), 71 S. W. 2d 174, at p. 175 27

Henwood v. Neal (Civ. App.), 198 S. W. 2d 125 (no app.) 23

Kansas City Southern Ry. v. Chandler (Civ. App.), 192 S. W. 2d 304 (Err. Ref., no rev. err.) 23

Lavender v. Kurn, 90 L. Ed. 916, 327 U. S. 645-654 9, 23

Lilly v. Grand Trunk Western R. R. Co., 87 L. Ed. 411, at p. 417, headnotes 6 and 7; 317 U. S. 481-492 32

Page

Lillie v. Thompson, 92 L. Ed. 73, Per Curiam, 332 U. S. 459-462 23
Lockley v. Page, 180 S. W. 2d 616 (Tex. Sup. Ct.) 23

E. J. O'Brien & Co. v. Shelton's Adm'r (Civ. App., Ky.), 55 S. W. 2d 352, at p. 354 27

Panhandle & S. F. Ry. Co. v. Brooks, 199 S. W. 665, at p. 668 (Civ. App.), aff. Sup. Ct. 222 S. W. 186 27

Railway Express Agency, Inc. v. Bannister (Civ. App., no app.), 46 S. W. 2d 372 ..... 11, 27, 28

San Antonio & Aransas Pass Railway Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626 6
Spencer v. Quincy O. & K. C. R. Co. (Sup. Ct., Mo., Reh. den.), 297 S. W. 353, p. 356 27
St. Louis, San Francisco & Texas Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129 6
Sullivan v. Texas, 207 U. S. 416, 52 L. Ed. 274, 28 Sup. Ct. 215 6

Tennant v. Peoria and Pekin Union R. Co., 88 L. Ed. 520, 321 U. S. 29 (U. S. S. Ct.) 23
Terminal R. Ass'n of St. Louis v. Schorb, 151 Fed. 2d 361 23
Tiller v. Atlantic Coast Line R. Co., 87 L. Ed. 610, 318 U. S. 54-73, 143 A. L. R. 967 22

Union Pacific Ry. Co. v. Hadley (Sup. Ct. U. S.), 62 L. Ed. 751, at p. 755; 246 U. S. 330 31
Urie v. Thompson, 93 L. Ed. 927, 69 S. Ct. 1018 31

Wilkerson v. McCarthy, 93 L. Ed. 497 (Sup. Ct. U. S.) 9, 12, 23

32 C. J. S., p. 1129, Sec. 1044 23
56 C. J. S., p. 1013, Sec. 260 27
28 U. S. C. A. 344, Sec. 344, Title 28, Judicial Code 7
Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C. A., Sec. 51 ..... 8, 29
Revised Rules of Sup. Ct. of U. S., paragraph (a), Sec. 5, Rule 38 7
17 Tex. Jur., pp. 910, 911, Sec. 410 23

In the

Supreme Court of the United States

OCTOBER TERM, 1950 49

No. .....

OLLIE B. ROBERTS,

Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS, TEXAS

To the Honorable Supreme Court of the United States:

Ollie B. Roberts, petitioner, prays that a Writ of Certiorari be issued to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas (the highest Court of the State of Texas in which decision could be had), reversing and rendering the judgment which petitioner had obtained in the Fifty-ninth Judicial District Court of Grayson County, Texas, a recovery under the Federal Employers' Liability Act.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner brought this suit under the provisions of the Federal Employers' Liability Act to recover damages for the loss of an eye sustained while employed as a joint express baggage man for respondent on January 2, 1948, while engaged in interstate commerce.

It was stipulated that on the occasion of petitioner's injury he was an employee of and engaged in the scope of his employment for respondent, Missouri-Kansas-Texas Railroad Company of Texas. (R. 201.)

The run which petitioner made was from Denison, Grayson County, Texas, located near Red River, the State line between Texas and Oklahoma, to Fort Worth, Tarrant County, Texas, and back to Denison, Texas. (R. 97.)

On the occasion of his injury, petitioner was working on his run, enroute to Denison, with instructions to throw a mail sack off the moving train at the Aubrey station (a small non-stop terminal about one hour out of Fort Worth). (R. 131, 132, 203.) As an express messenger he had worked on several railroad lines other than the lines of Missouri-Kansas-Texas Railroad Company of Texas, and this run with the Missouri-Kansas-Texas Railroad Company of Texas was the first run on which he had ever been required to throw mail from a moving train. (R. 103-104.) He had been on the Denison to Fort Worth run for only forty-five days when he received the injury herein complained of. (R. 127-128.)

On January 2, 1948, at approximately 5:00 P. M., petitioner was struck in the face by sand, kicked up by the motion of the train, when he looked from the open, unprotected door of the express or baggage car to see that the station was clear and to enable him to make the mail throw properly. (R. 105-107.)

Petitioner pled that he was performing his work by the methods adopted by respondent, that the adoption of such methods was negligence, and a proximate cause of his injuries.

The work which petitioner was doing on the occasion of his injury was the delivery of mail from a moving train to a stationary platform. There were two different methods for the performance of this work generally in use and adoption on the railroad lines of this Country at that time:

I. The method used by petitioner and those railroad employees working in baggage cars.

Petitioner worked from a large door, six to eight feet wide (R. 99-100, 216) which opened by sliding forward in the front end of the baggage car. Upon approaching the station where the delivery was to be made, he would place the mail on the floor by his side, and slide the door from the rear forward approximately two feet. Holding to the sill of the door with his left hand, and the door with his right hand, he would stick his head out and sight down the road toward the platform so as to time his throw. Having ascertained the distance, he would then open the door farther, holding himself inside the moving train with his right or left hand upon the door, depending upon which

side of the train the throw was to be made, and with his other hand he would reach down and pick up the sack of mail, look out of the door again, and throw it at the proper time, so that it would land safely within the area designated for the throw at that particular station. (R. 105-107, 137-139, 157-166, 186-187, 206-210, 217-218, 228-230, 315, 327-328, Paragraph 2, Original Opinion of Court of Civil Appeals.) This work was done from a wide door, with no available bars or rails to protect him from falling off the train. (R. 219, 279, 280.)

II. The method used by Railroad Post Office employees, working in standard R. P. O. cars:

Here the employee works from a narrow door, three and one-half feet wide (R. 304), across which a safety bar is attached which he holds with his hands (R. 304-305), and in front of which is attached a cinder shield at the approximate height of a man's head. (R. 292, 296-297, 302-303.) Here the employee, upon approaching the station, places the mail on the floor in front of his right or left foot, depending upon the side from which the delivery is made, sticks his head out the narrow door, and at the proper instant kicks the mail off the floor of the baggage car with his foot, so that it will be delivered at approximately the correct location. (R. 232-233, 255-256, 294-295.)

The Missouri-Kansas-Texas Train Number 12, from which petitioner dispatched mail from a baggage car, and from which the R. P. O. operator dispatched mail from an R. P. O. car, travelled at about forty-five miles per hour (R.

105), better than sixty-six (66) feet per second, as it passed the Aubrey Station. (R. 222-223.) The baggage car and the R. P. O. car were always in the same part of the train. The R. P. O. car was connected to the baggage car directly behind the engine and never more than one or two cars behind the engine. (R. 104, 116.) While the train was in motion, grass, weeds, fine particles of sand, and larger particles of gravel were constantly swept up by the suction from the train and thrown back adjacent to the tracks and past the baggage and R. P. O. car door. (R. 211, 217, 234-235, 277, 281.)

This flying debris constituted a hazard to the baggage car operator (R. 234-235), a hazard which had always been known to the Missouri-Kansas-Texas Railroad Company of Texas. (R. 216, 217, 281.) The same flying debris that swept past the baggage car was also present around the R. P. O. car. (R. 230, 231.) No R. P. O. employee in this case testified that the dispatching of mail from a moving R. P. O. car was hazardous, while all witnesses in the case testified that the delivery of mail from a moving baggage car created a hazard to the employee's eyes and face. While there were Government regulations prescribed for the safety devices on the R. P. O. car, there were no Government regulations prescribing safety devices on the baggage car. The method adopted by Missouri-Kansas-Texas Railroad Company of Texas was a method of its own choice and adoption. (R. 282.)

Petitioner contended that respondent was negligent in the adoption of the method which it adopted for petitioner to use in the performance of his work for respondent.

Upon the conclusion of the trial, judgment was entered for petitioner in the sum of $8,914.48 against Missouri-Kansas-Texas Railroad Company of Texas. (R. 68.)

Upon appeal, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas reversed and rendered the judgment of the trial court (R. 327, Opinion of Court of Civil Appeals); upon motion for rehearing, reformed the judgment to award petitioner $13,371.71, and at the same time overruled petitioner's first motion for rehearing and reversed and rendered the cause against petitioner. (R. 333, Supplemental Opinion of Court of Civil Appeals.) Petitioner's second motion for rehearing before the Court of Civil Appeals was overruled (R. 347); his application for a writ of error to the Supreme Court of Texas was refused, with the notation, "No reversible error." (R. 410.) His motion for rehearing of his application for writ of error (R. 411) was overruled by the Supreme Court of Texas on the 15th day of February, 1950. (R. 413.) Thereby, the judgment and opinions of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, became a judgment rendered by the highest court of Texas in which a decision could be had. *(Sullivan v. Texas, 207 U. S. 416, 52 L. Ed. 274, 28 Sup. Ct. 215; Bacon v. Texas, 163 U. S. 207, 41 L. Ed. 132, 16 Sup. Ct. 1023; St. Louis, San Francisco & Texas Railway Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129; San Antonio & Aransas Pass Railway Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626.)*

BASIS FOR JURISDICTION

Petitioner, in support of the jurisdiction of the Supreme Court of the United States to review on Writ of Certiorari the above entitled cause and decrees of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, respectfully represents:

A. The jurisdiction of this Court is based upon paragraph (b) of Section 344, Title 28 of the Judicial Code as amended, 28 U. S. C. A. 344.

B. The nature of the case and the erroneous construction placed upon the Federal Employers' Liability Act by the State Court is brought within the jurisdictional indications of paragraph (a) of Section 5, Rule 38, of the Revised Rules of the Supreme Court of the United States, which provides that this Honorable Court may review on Writ of Certiorari, "(a) where a state court has decided a federal question of substance * * * in a 'way probably not in accord with the applicable decisions of this Court'."

C. The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, became final on the 3rd day of March, 1950, which was fifteen days after the Supreme Court of Texas overruled petitioner's motion for rehearing of his application for writ of error (R. 413); and this application, the pleadings, record, and supporting brief are being filed in this Honorable Court within the time extended by this Court for the filing thereof.

The Texas Court of Civil Appeals invaded the province of the jury by holding that the underlying factual premise must be definitely and certainly found upon appellate review; by reviewing the evidence in its most unfavorable light and contrary to the findings of fact made by the jury; by erroneously quoting the findings of fact made by the jury; and by then holding that the findings of the jury were invalid because they were made in response to an improper general submission; and thus reversed and rendered this cause.

Each of the above constitutes an invasion of Federal rights created under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51; 10a F. C. A., Title 45, Sec. 51), and is contrary to the interpretations of said Act heretofore expressed by this Honorable Court.

D. This Court has jurisdiction because the opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas conflicts with decisions of this Court, particularly in the case of *Blair v. Baltimore & Ohio Railroad, 89 L. Ed. 490, at p. 494, 323 U. S. 600-605*, and the Circuit Court of Appeals of the United States for the Third Circuit, in the case of *Delevie v. Reading Co., 176 Fed. 2d 496*, in that in the *Blair case* the method of doing the work involved was the same custom followed for years, and in the *Delevie case* the placing of the instrumentality involved was the accepted method, location, and practice; the holdings allowing recovery in both instances.

The decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas further conflicts with

Brown v. Western Ry. of Alabama, 70 S. Ct. 105, S. Ct. Reporter Dec. 1, 1949, Law Ed. Advance Opinions, Vol. 94, Advance Sheet No. 2, wherein this Court held that Federal rights created under the Federal Employers' Liability Act shall not be destroyed by strict, meticulous local rules of procedure.

The decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas further conflicts with *Lavender v. Kurn, 90 L. Ed. 916, 327 U. S. 645-654,* and *Wilkerson v. McCarthy, 93 L. Ed. 497,* wherein this Court held that the province of the jury, on contested questions of negligence and causation, shall not be unduly invaded upon appellate review.

THE BASIC QUESTION POSTULATED

Can the appellate courts of the State of Texas, in suits brought under the Federal Employers' Liability Act, deny plaintiff recovery when negligence and causation have been pleaded, proven, and found by the jury to exist?

QUESTIONS PRESENTED

1. Whether the Court of Civil Appeals erred in reviewing the evidence in the light most favorable to respondent, and contrary to the verdict of the jury.

2. Whether the focal point of judicial review of findings of fact shall be extended so as to require the underlying factual premise to be definitely and certainly found by the appellate court.

3. Whether the submission of negligence and causation by special issue, based upon an uncontradicted method of work, is a general submission.

4. Whether the Texas Court of Civil Appeals erroneously reversed and rendered this case, even assuming that the submission referred to in "3" above was a general submisssion.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Petitioner respectfully doubts if any appellate jurisdiction has gone as far afield in usurping the functions of the jury as have the appellate courts of Texas, both from the standpoint of actual review of the evidence, and from the standpoint of constantly changing, increasingly stringent rules regarding submission by special issues.

Although the opinions of this Court clearly define the limits of appellate review of jurys' findings of fact, this Court has never taken jurisdiction of and written an opinion on a case brought under the Federal Employers' Liability Act, appealed from the State Courts of Texas. The issue here involved is of vital importance, both from the standpoint of the protection of federal rights in the State Courts of Texas, and from the standpoint of uniformity in the adjudication of Federal law throughout the United States.

1. In holding that the jury had no evidence upon which to base its findings of fact in regard to the negligent method for performing the work which petitioner was doing, the Texas Court of Civil Appeals first enlarged upon the meaning of the findings of fact until it became "the method of conducting respondent's business," and thereby

evaded the evidence upon which the jury based its findings. The method which petitioner used to perform his work was uncontradicted; that such a method for the performance of this work had been adopted by respondent was uncontradicted; that there was in existence a safer method for the performance of this work was clearly proven. It cannot be said that it was unreasonable for the jury to infer and believe that the adoption of the most dangerous method was negligence.

2. Up until the opinions in this case, it was the law in Texas, in cases where assumed risk was not a defense, that it was the master's duty to adopt a reasonably safe method for the performance of the employee's work. The trial judge who tried this case submitted the special issues on "method of work," which were submitted in *Railway Express Agency v. Bannister, 46 S. W. 2d 372 (Civ. App., no app.)*. The form of submission there used, as in the instant case, is the only way method of work can be submitted, because if a separate issue be framed as to each movement the employee makes in performing his work, the method as such ceases to exist, because it is broken up into its component parts. Thus, the opinion of the Court of Civil Appeals abolished the above duty, by holding that in the only form in which it could be submitted it is a general submission and improper.

CONCLUSION

The lack of respect for the historic rôle of the jury in the Texas Appellate Jurisdiction, both from the standpoint of finding the facts contra to the verdict of the jury and by

imposing constantly changing stringent rules of special issue submission, has created such confusion in Texas that an opinion by this Court is warranted and necessary. (*Wilkerson v. McCarthy, 93 L. Ed. 497, at p. 509; 336 U. S. 53-77.*)

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

WEBB & ROGERS,
Grayson County State Bk. Bg.,
Sherman, Texas,

By .....

Attorneys for Petitioner,
Ollie B. Roberts.

APPENDIX AND SPECIFICATION OF ERRORS

The following points of error were assigned in the courts below as the same point of error, and are specifically brought forward and made a part of this petition:

POINT NUMBER ONE

The error of the Court of Civil Appeals in reviewing the record in the light most favorable to respondent, contrary to the verdict of the jury and judgment of the trial court. (Germane to Assignment of Error No. VI, Second Motion for Rehearing, Court of Civil Appeals.)

POINT NUMBER TWO

The error of the Court of Civil Appeals in holding there was no evidence to support petitioner's claim. (Germane to Assignments of Error Nos. I and VI, Second Motion for Rehearing, Court of Civil Appeals.)

POINT NUMBER THREE

The trial court properly rendered judgment for Petitioner on the jury's answer to Special Issues Numbers 5A, 5B, and 5C, thereby holding in effect that Respondent's objections and exceptions thereto were without merit, and that the answers thereto were not in conflict with the answers to Special Issues Numbers 3 and 4; and the Court of Civil Appeals erred in not so holding. (Germane to Assignments of Error Nos. II, V, and VI, Second Motion for Rehearing, Court of Civil Appeals.)

POINT NUMBER FOUR

The Court of Civil Appeals erred in holding that Special Issue No. 5-A and the corollary issues thereto constitute a general submission, thereby obliterating from the law of the State of Texas the Employer's duty of adopting a reasonably safe method for the performance of work by its employees, under the guise of holding that in the only form in which it could possibly be submitted, it is a general submission. (Germane to Assignment of Error No. V, Second Motion for Rehearing, Court of Civil Appeals.)

In the

Supreme Court of the United States

OCTOBER TERM, 1948 49

No. .....

OLLIE B. ROBERTS,

Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas (R. 327, 333), is reported in *225 S. W. 2d 198.*

GROUND OF JURISDICTION

A statement of the basis of the jurisdiction of this Court is contained in the foregoing petition, and for brevity is here adopted and not repeated.

CONCISE STATEMENT OF THE CASE

The essential facts of the case are stated in the foregoing petition, and for brevity are adopted and not repeated here.

SPECIFICATION OF ERRORS

The errors to be urged are set forth in the Appendix to the petition, and for brevity are adopted and not repeated here.

POINTS PRESENTED AND ARGUMENT

SUMMARY OF ARGUMENT

I. There was error in reviewing the record in the light most favorable to respondent, contrary to the verdict of the jury and judgment of the trial court. (Germane to Points Numbers One and Two of this Petition for Writ of Certiorari.)

A. The error of the Court of Civil Appeals in erroneously quoting the jury's findings, and thus enlarging them from "the method used by petitioner in performing his work" to "respondent's method of conducting its business."

B. The error of the Court of Civil Appeals in failing to review the evidence relevant to the findings made by the jury.

1. The evidence is undisputed that petitioner was working by the method adopted by respondent for him to follow in performing his work; that work by such method was hazardous to a baggage man and that this hazardous condition had long been known by respondent.

2. The evidence clearly establishes that had respondent adopted the method used by the Railroad Post Office for the performance of the same work, the exposure to the known hazard which caused petitioner's injury would not have occurred.

C. The Court of Civil Appeals erred in enlarging its power of judicial review of findings of fact, so as to require the underlying factual premise to be definitely and certainly established before the appellate court, regardless of the findings theretofore made by the jury, contrary to federal judicial precedents.

1. Such encroachment upon the rights of jury trial, transferring the ultimate fact finding agency from the jury to the appellate court, defeats the purpose of the jury system, destroys heretofore established precedents under the Federal Employers' Liability Act, and prevents uniform adjudication of federal rights under said Act.

II. There was error in holding that Special Issue Number 5-A and corollary issues thereto constituted a general submission, and thereby obliterating from the law of the State of Texas the employer's duty of adopting a reasonably safe method for the performance of work by its employees, under the guise of holding that in the only form in which it could possibly be submitted, it is a general submission. (Germane to Points Numbers Three and Four of this Petition for Writ of Certiorari.)

A. The method used for the performance of his work on the occasion of petitioner's injury was uncontradicted; that such a method had been adopted by respondent for the performance of this type of work was uncontradicted. To hold that the submission of negligence and causation to a jury, based upon this uncontradicted evidence, is an improper general submission, constitutes an invasion of the jury system in the State of Texas, depriving petitioner of federal rights, which prevents uniform adjudication of the Federal Employers' Liability Act.

B. The stringent rule here adopted by the Court of Civil Appeals, in holding that the submission of "method of work" is an improper general submission, has abolished the master's duty to adopt a reasonably safe method for the performance of work in the State of Texas, destroying federal rights, and preventing the uniform adjudication of the Federal Employers' Liability Act.

POINT NUMBER ONE

The error of the Court of Civil Appeals in reviewing the record in the light most favorable to respondent, contrary to the verdict of the jury and judgment of the trial court. (Germane to Assignment of Error No. VI, Second Motion for Rehearing, Court of Civil Appeals.)

POINT NUMBER TWO

The error of the Court of Civil Appeals in holding there was no evidence to support petitioner's claim. (Germane to Assignments of Error Nos. I and VI, Second Motion for Rehearing, Court of Civil Appeals.)

Argument under Points Numbers One and Two

The Court of Civil Appeals held that there was no evidence to support the submission of negligence and causation in regard to the method adopted by Respondent for the performance of Petitioner's work.

The Court of Civil Appeals has: (1) erroneously quoted the findings of fact made by the jury; (2) and, having done so, failed to review the evidence relevant thereto; and (3) applied a new rule of construction as to the appellate limits of judicial review of findings of fact, depriving petitioner

of federal rights created by the Federal Employers' Liability Act.

(1)

The only mention or quotation of the findings of fact made by the jury in answer to Special Issues 5A, 5B, and 5C appears in the sixth paragraph of the Court's original opinion, as follows:

> "* * * that the defendant was guilty of negligence in the 'methods adopted for the conduct of its business'." (Court's opinion, R. 330.)

The above was taken from the ancillary issue of negligence, Special Issue No. 5-B, which was qualified by "such methods for conducting its business," which referred to Special Issue No. 5A: "Ollie B. Roberts was doing his work by the methods adopted by * * * *" respondent, etc. (R. 55.) The Court, by thus enlarging the scope of the finding of fact made by the jury, by copying from the ancillary issue of negligence instead of using the wordage of Special Issue No. 5A (R. 55), has broadened the scope of the jury's finding to the unlimited extent that it became, in paragraph 7 of the Court's opinion (R. 331): "defendant's method of doing business."

Having circumvented the fundamental fact (the method adopted for the work Petitioner was doing at the time of his injury), the Court was free to roam at will throughout the pleadings, exceptions and generalities found in any record, in its discussion of respondent's method of doing business.

(2)

What was this method adopted by respondent for the performance of petitioner's work? As heretofore stated, it was uncontradicted that the following method was both used by Petitioner on the occasion of his injury and adopted by respondent for the performance of this work over its entire system: That as the train on which he was working approached the Aubrey Station, O. B. Roberts placed a sack of mail where he could later pick it up and make his throw for delivery, opened the baggage car door, and with one hand on the sliding door and the other hand on the door sill, looked out the door toward the Aubrey Station.

In addition to the above, uncontradicted and undisputed evidence proved by both petitioner and respondent established:

That in the act of making the delivery he had to stick his head out of the door facing the known hazard twice: the first time as set out above, while the train was at some distance from the station; then as the train sped toward the station he must shove the door wider, reach down and pick up the sack of mail, look out again, and make his throw at the proper time. (See original opinion of the Court of Civil Appeals, paragraph 2, R. 327-328.) Ollie B. Roberts, petitioner (R. 104-107, 137-138, 157-166, 186-187, 315); G. C. Bentinck (R. 206-210, 217-218); G. D. Veitch (R. 228-229).

Petitioner submits that not only was the work which he was required to perform dangerous to his eyes and face, but that it was also very complex in nature, in that he had

no way of telling what type of debris was going to be swept up by the motion of the train and thrown past the baggage car door from which he was required to operate. The flying debris appeared on each occasion all of a sudden and without warning. It varied from dirt, grass, weeds, and sand, to larger particles of sand and small rock. The conditions that he faced on each occasion that he made a dispatch of mail from the baggage car on respondent's moving train were different and uncertain. (R. 104, 209-211, 216-217, 234-235, 276-277, 281.)

There was another method for doing this same work, which respondent did not use and had not adopted, and which, because of its very nature, required the employee to expose his eyes to the known hazard but once, if at all, and then very briefly:

The R. P. O. employee, with both hands on the protector bar extending across the narrow three and one-half foot door, with the mail sack on the floor in front of his foot, and as the train sped past the point of delivery, looked out, and if the delivery area was clear, kicked the mail off the train with his foot. W. R. McDonald, District Superintendent, Railway Postal Service (R. 248, 251, 254-256); O. H. Barker, Passenger Car Shop Foreman of G. C. & S. F., a part of A. T. & S. F. Ry. Co. (R. 262); M. O. Belden (R. 291-295); Fred A. Ryle (R. 299-304).

(3)

The Court of Civil Appeals, having overlooked the ultimate fact submitted to the jury, has applied an improper

rule of construction to that part of the above evidence which it may have considered.

In paragraph 7 of its opinion it held: "Applying the most liberal rule of construction, the underlying factual premise cannot be *definitely* and *certainly found*, even by inference or implication, that the methods employed by the defendant in the operation of its business were a proximate cause of plaintiff's injuries." (Italics ours.) (Court's opinion, R. 331.) To require Petitioner to "definitely and certainly" establish his findings of fact before the appellate court places a greater burden on him than he has heretofore been required to meet, either upon appeal or before the trial court, in either criminal (beyond a reasonable doubt) or civil cases (by a preponderance of the evidence).

Heretofore, the law has been established by this Court to the effect that jury findings will not be disturbed upon appeal, unless, after reviewing the record in its most favorable light in favor of said findings, the inferences drawn by the jury are unreasonable.

This Honorable Court has repeatedly upheld the province of the jury and jealously protected the jury system, in announcing the above proposition.

Tiller v. Atlantic Coast Line R. Co., 87 L. Ed. 610, 318 U. S. 54-73, 143 A. L. R. 967 (at 87 L. Ed. 618):

> " 'We see no reason, so long as the ~~in~~jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 32 L. Ed. 478, 479. Or as we have put it on another oc-

casion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

Tennant v. Peoria and Pekin Union R. Co., 88 L. Ed. 520, at p. 525, 321 U. S. 29;

Bailey v. Central Vermont R. Co., 87 L. Ed. 1444, at p. 1447, 319 U. S. 350, 63 S. Ct. 1062;

Lavender v. Kurn, 90 L. Ed. 916, at p. 923, 327 U. S. 645-654, 66 S. Ct. 470;

Wilkerson v. McCarthy, 93 L. Ed. 497, at p. 505 (U. S. Sup. Ct.);

Newton W. Ellis v. Union Pacific Railroad Co., 91 L. Ed. 572, at p. 576; 329 U. S. 649-653;

Clarence W. Blair v. Baltimore & Ohio Railroad Co., 89 L. Ed. 490, at p. 494 (U. S. Sup. Ct.), 323 U. S. 600-606;

Lillie v. Thompson, 92 L. Ed. 73, at p. 74, Per Curiam; 332 U. S. 459-462;

Terminal R. Ass'n of St. Louis v. Schorb, 151 Fed. 2d 361, at p. 365;

Chicago & N. W. R. Co. v. Grauel (Circuit Ct. App., Reh. den.), 160 Fed. 2d 820, at pp. 825, 826;

Lockley v. Page (Tex. Sup. Ct.), 180 S. W. 2d 616;

Henwood v. Neal (Civ. App., no app.), 198 S. W. 2d 125;

Kansas City Southern Ry. Co. v. Chandler (Civ. App.), 192 S. W. 2d 304 (Err. Ref., no reversible err.);

17 Tex. Jur. pp. 910, 911, Sec. 410;

32 C. J. S., p. 1129, Sec. 1044.

Was it unreasonable for the jury to infer that it was negligence and a proximate cause of Petitioner's injuries for Respondent to adopt a method which required Petitioner to be exposed to a known hazard twice, while other methods used for the performance of the same work completely eliminated the exposure which caused petitioner's injury?

The jury believed the uncontradicted evidence which was placed before them; believed that in the performance of this work petitioner was forced to face a known hazard to his eyes, inferred and believed that it was negligence to adopt the method which respondent used, subjecting petitioner to this hazard; believed and inferred that the use of such method was a proximate cause of petitioner's injury, because the safer method which respondent could have adopted would have eliminated the exposure to the hazard which caused his injury.

The triers of the facts believed that the act of respondent in adopting its method which Roberts used to perform his work, requiring him to subject his eyes to this known hazard, was a failure to exercise ordinary care in the adoption of a reasonably safe method. When all of the evidence is viewed in its light most favorable to their findings, it cannot be said that they had no evidence upon which to establish or infer the same, that their findings were unreasonable.

The Court of Civil Appeals by its opinion has erred, by failing to review the evidence in its most favorable light in support of the judgment of the trial court, and by apply-

ing an erroneous and improper rule of substantive law as to the focal point of judicial review of findings of fact made by the jury.

The Court of Civil Appeals has confused the methods of doing petitioner's work with the equipment provided on respondent's trains, and in paragraph four of its original opinion has erroneously found that the only difference between the two methods proved upon the trial was the availability of such equipment (cinder shields and bar protector).

Petitioner submits that the opinion of the Court of Civil Appeals has endangered the right of jury trial in the State of Texas, and if allowed to stand establishes a precedent contrary to the opinions of this Court, which can only result in complete confusion, not only in our own State but in other jurisdictions. If the appellate courts, because of their unlimited power, substitute their findings and beliefs for those made by a jury, without regard for the evidence upon which the jury based its findings, then trial by a jury in our State shall become merely an agency from which the successful litigant must obtain favorable findings of fact to entitle him to then argue and submit his facts to the appellate court.

No more vital nor important question exists today in the field of jurisprudence.

Petitioner earnestly insists that the opinion of the Court of Civil Appeals incorrectly and wrongfully states the law of this case, and dangerously enlarges the scope of appellate review of findings of fact, and that he has been denied

the right of trial by jury under the Federal Employers' Liability Act.

POINT NUMBER THREE

The trial court properly rendered judgment for Petitioner on the jury's answer to Special Issues Numbers 5A, 5B, and 5C, thereby holding in effect that Respondent's objections and exceptions thereto were without merit, and that the answers thereto were not in conflict with the answers to Special Issues Numbers 3 and 4; and the Court of Civil Appeals erred in not so holding. (Germane to Assignments of Error Nos. II, V, and VI, Second Motion for Rehearing, Court of Civil Appeals.)

POINT NUMBER FOUR

The Court of Civil Appeals erred in holding that Special Issue No. 5-A and the corollary issues thereto constitute a general submission, thereby obliterating from the law of the State of Texas the Employer's duty of adopting a reasonably safe method for the performance of work by its employees, under the guise of holding that in the only form in which it could possibly be submitted, it is a general submission. (Germane to Assignment of Error No. V, Second Motion for Rehearing, Court of Civil Appeals.)

Argument under Points Numbers Three and Four

The Court of Civil Appeals held that the trial court's submission of the breach of the master's duty to adopt a reasonably safe method of work for petitioner constituted

a general submission, and thus reversed and rendered the trial court's judgment.

Petitioner pled that he was performing his work by the methods adopted by respondent, that the adoption of such methods was negligence, and a proximate cause of his injuries. (R. 30, 31.) It is the master's duty to adopt a reasonably safe method for the performance of the master's work by his employee.

Vol. 56, C. J. S., 1013, Sec. 260;

Ry. Express Agency v. Bannister, 46 S. W. 2d 372 (Civ. App., no app.);

Galveston H. & S. A. Ry. Co. v. Contois (Civ. App.), 279 S. W. 929, p. 932; aff. by Comm. App., app. by Sup. Ct., 288 S. W. ~~2d~~ 154; writ of certiorari den., 274 U. S. 747, 71 L. Ed. 1328;

Panhandle & S. F. Ry. Co. v. Brooks, 199 S. W. 665, at p. 668 (Civ. App.), aff. Sup. Ct., 222 S. W. 186;

Gordon Jones Const. Co. v. Lopez (Civ. App.), 172 S. W. 987, at p. 989 (Reversed on other grounds);

Clark v. Widmer Engineering Co. (St. Louis Ct. App., Mo., Reh. den.), 263 S. W. 500, at pp. 503, 504;

Grandstaff v. Wabash Ry. Co. (Kansas City Ct. App., Mo., Reh. den.), 71 S. W. 2d 174, at p. 175;

Spencer v. Quincy O. & K. C. R. Co. (Sup. Ct., Mo., Reh. den.), 297 S. W. 353, p. 356;

E. J. O'Brien & Co. v. Shelton's Adm'r (Civ. App., Ky.), 55 S. W. 2d 352, p. 354.

It being undisputed that petitioner was performing his work by the methods adopted by respondent, and it being undisputed that respondent had adopted such methods for the performance of this work, there actually remained but two contested findings of fact submitting this one violation of duty: 1. Was the adoption of such methods negligence? 2. Was such negligence a proximate cause of his injury?

The trial court, following the special issue submission used in the Texas case of *Railway Express Agency v. Bannister, 46 S. W. 2d 372 (Civ. App., no app.)*, submitted to the jury and obtained the following findings of fact:

1. That on the occasion in question, petitioner was doing his work by the methods adopted by respondent. (Special Issue No. 5A, R. 55.)

2. That the adopting of such methods was negligence. (Special Issue No. 5B, R. 55.)

3. That such negligence was a proximate cause of his injuries. (Special Issue No. 5C, R. 56.)

The submission of the breach of the above duty rarely arises, except in those cases where the defense of assumed risk is denied the defendant by statute (in this case by the Federal Employers' Liability Act). Where the defense of assumed risk was denied defendant by the Workmen's Compensation Law for failure to carry Workmen's Compensation Insurance, an identical submission was used in *Railway Express Agency, Inc. v. Bannister, 46 S. W. 2d 372 (Civ. App., no app.)*. The submission there used is the

only way findings of fact can be obtained upon this one act of negligence.

The method adopted for the performance of work ceases to exist as a method when it is broken up into each of its component movements. However, in this case each of the component movements was uncontradicted, both from the standpoint that they were used by petitioner on the occasion of his injuries (R. 206-210, 228-229), and from the standpoint that they had been adopted by respondent. (R. 228-229, 236-237, 282.) Thus, in holding that the submission of an employer's duty to adopt a reasonably safe method for the performance of work, in the only form in which it was possible to submit it, is a general submission, the Court of Civil Appeals has abolished this duty of the master in the State of Texas, directly in conflict with other opinions heretofore considered as the established law of the State, and has established a precedent which will prevent the adjudication of the Federal Employers' Liability Act from being uniform.

The Court of Civil Appeals, in reviewing the evidence as though the submission of this duty to the jury involved "method of conducting business," instead of the issue as determined by the jury: "method of performing work," has confused the work which petitioner was doing with the equipment attached to the car, i. e., cinder shield and other pieces of equipment referred to in the opinion, and then held that the submission of this duty was a general submission. Assuming that it was, petitioner's rights sought here to be enforced evolve from a Federal Statute (Fed. Emp. Lia. Act, 53 Stat. 1404, 45 U. S. C.), Section 51 of

which reads: "action lies for injuries * * * resulting in whole or in part from the negligence * * *" of the carrier.

The rights here destroyed by the opinion of the Court of Civil Appeals are federal rights.

Bailey v. Central Vermont R. Co., 87 L. Ed. 1444, 319 U. S. 350, at pp. 353, 354 (at 87 L. Ed. P. 1447):

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights, protected by federal rather than local rules of law."

Mr. Justice Holmes early announced a rule which this Court has followed in this class of cases, in *American Railway Exp. Co. v. Levee, 68 L. Ed. 140 (at p. 143), 263 U. S. 19, 44 Sup. Ct. Rep. 11:*

> "The law of the United States cannot be evaded by the forms of local practice."

Brown v. Western Ry. of Alabama, argued Oct. 19, 1949, opinion dated November 21, 1949, *70 S. Ct. 105; S. Ct. Reporter, Dec. 1, 1949, Law Ed. Advance Opinions, Vol. 94, Advance Sheet No. 2:*

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal law. 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made is not to be defeated under the name of local practice.' Davis v. Wechsler, supra, 263 U. S. at p. 24, 44 S. Ct., at p. 14; C. F. Maty v. Grassalli Chemical Co., 303 U. S. 197, 58 S. Ct. 507, 82 L. Ed. 745. Should this Court fail to protect federally created rights from dismissal because of

over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved. See Brady v. Southern R. Co., 302 U. S. 476, 479, 64 S. Ct. 232, 234, 88 L. Ed. 239."

Urie v. Thompson, 93 L. Ed. 927, 69 Sup. Ct. 1018:

"Whatever the effect of the State Supreme Court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner. Local rules of practice cannot bar this court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review * * *. Hence the Missouri Supreme Court's decision on the first appeal, that the complaint did not state a cause of action for negligence, is subject to our independent review and is not to be taken as governed conclusively by the state court decisions which alone were cited in support of the determination."

Ellis v. Union Pacific R. Co., 91 L. Ed. 572, 329 U. S. 649-653 (at 91 L. Ed. p. 576):

"* * * The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury * * *. Whether those standards are satisfied is a federal question, the rights created being federal rights."

Union Pacific Ry. Co. v. Hadley (Sup. Ct. U. S.), 62 L. Ed. 751, 246 U. S. 330, upon the question of negligence held *(62 L. Ed., at p. 755):*

"* * * But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the de-

fendant's conduct, viewed as a whole, warranted a finding of neglect."

See *Blair v. Baltimore & Ohio Railroad, 89 L. Ed. 490, at P. 494, headnote 3, 323 U. S. 600-606.*

Even assuming that the jury found against petitioner on a specific act of negligence and for him on a general submission, the Court of Civil Appeals erroneously held that the specific finding would control, federal rights being involved under the Federal Employers' Liability Act.

See *Lilly v. Grand Trunk Western R. Co., 87 L. Ed. 411, at p. 417, headnotes 6 and 7; 317 U. S. 481-492.*

The State of Texas has thus isolated itself from the uniform adjudication of Federal Employers' Liability Act cases, contrary to repeated accepted precedents from this Honorable Court.

The constant encroachment of the appellate courts of the State of Texas, progressively invading the province of the jury by nullifying their findings of fact, and by ever changing, increasingly stringent rulings and interpretations of definitions and special issues, has left the State as a jurisdiction where almost every case which is tried is appealed, for none can know but what the fruits of appeal will be to his advantage, and to say the least, the losing litigant's chances of success are fair.

The antipathy of the Texas appellate courts to the Federal Employer's Liability Act is clear. The juggling of the increasing maze of local technical practice results in the actual destruction of most of the federal rights created

by Congress under the Act. Seldom, if ever, will the Supreme Court of Texas take jurisdiction to discuss these rights, and beneath its appellate level the Texas Courts of Civil Appeals have written confusion into a law which Congress and the opinions of the Supreme Court of the United States have made clear.

There can be no uniform adjudication of federal rights which the Congress has sought to bestow, with Texas proceeding in one direction and the remainder of the Nation proceeding in another.

The Court's opinion has as effectively destroyed the master's duty to adopt a reasonably safe method for the performance of work as if it had expressly reversed the decisions cited on page 27, supra; has deprived Petitioner of fair judicial review by inaccurately quoting and ignoring the true meaning of the jury's findings of fact; has applied a rule of construction for appellate review of jury findings contrary to federal precedent; has evaded the evidence upon which the jury based its findings as effectively as if it had first set out to find the facts and then argued and justified its reasons therefor.

Petitioner earnestly insists that the opinion of the Court of Civil Appeals wholly, incorrectly and wrongfully states the law of this case, and he earnestly insists that he was denied basic rights granted him by the jury verdict and judgment of the trial court by said holding.

Petitioner contends that the opinion of the Court of Civil Appeals on motion for rehearing, reforming the judgment of the trial court so as to award petitioner damages in

the sum of $13,371.71, correctly applies the law as there cited, and no point of error has been perfected by respondent for submission to this Court, contrary thereto.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari, so that upon final hearing hereof, judgment of the State Courts in this case be reversed, wherein they deny petitioner relief; and that the judgment of the trial court be reformed, awarding petitioner damages in the sum of $13,371.00, to the end that uniformity may prevail and that justice may be done.

Respectfully submitted,

WEBB & ROGERS,
Grayson County State Bk. Bg.,
Sherman, Texas,

By .....

Attorneys for Petitioner,
Ollie B. Roberts.

Office - Supreme Court,
FILED
JUL 18 1950
CHARLES ELMORE CRO
OL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 164

OLLIE B. ROBERTS, *Petitioner*,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, *Respondent.*

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS, TEXAS, AND BRIEF IN SUPPORT THEREOF

RALPH ELLIOTT
Counsel for Respondent

OF COUNSEL:

G. H. PENLAND
General Solicitor
Missouri-Kansas-Texas Railroad Company
Katy Building
Dallas, Texas

BURFORD, RYBURN, HINCKS AND FORD
Interurban Building
Dallas, Texas

FREELS & ELLIOTT
207-09 Commercial Bldg.
Sherman, Texas

E. DUNCAN & CO. Brief Printers, 1329 E. Jefferson Dallas, Texas

SUBJECT INDEX

	Page
Answer to Petition for Certiorari	1-12
Summary and Short Statement of the matter involved	1- 7
No Basis for Jurisdiction	5- 8
No Reviewable Questions Presented	8
Untenable Reasons Relied Upon For Allowance of Writ	9-11
Conclusion	11-12
Brief in Support of Answer to Petition	13-33
Challenge to Grounds of Jurisdiction	13-18
Concise Statement of Case	18
Counter Points Presented and Argument	18-19
Summary of Argument	18-19
Counter Point No. 1	20
Argument under Counter Point No. 1	21-26
Counter Point No. 2	26
Argument under Counter Point No. 2	26-32
Conclusion	32-33

LIST OF AUTHORITIES

Page

Affolder v. New York, C. & St. L. R. Co., —— U. S. ——, 94 L. Ed. 439, Adv. Op. No. 10, 70 S. Ct. 509 14

Alamo Mills Co. v. Hercules Iron Works, 22 S. W. 1097 22

Atchison, T. & S. F. Ry. Co. v. Saxon (1932) Cert. gr. 284 U.S. 604, 76 L. Ed. 518, 52 S. Ct. 30; 284 U.S. 458, 76 L. Ed. 397, 52 S. Ct. 229, reversing 36 S.W. 2d 228 9

Bateman v. Cleghorn, 266 S. W. 422 23

Benson v. Missouri-Kansas & Texas R. Co. 200 S. W. 2d 233; cert. den. 332 U.S. 830, 90 L. Ed. 403, 68 S. Ct. 206 31

Black v. Drury, 24 Tex. 289 25

Boatmen's Bank v. Fritzlen, 135 Fed. 650, cert. den., 198 U.S. 586, 49 L. Ed. 1174, 25 S. Ct. 803 24

Bragg v. Hughes, 53 S. W. 2d 151 31

Brown v. Western Railway of Alabama, 338 U.S. 294, 94 L. Ed. 97, Adv. Op. No. 2, 70 S. Ct. 104 ..... 14, 18

Carr v. Nichols, 157 U.S. 370, 39 L. Ed. 736, 15 S. Ct. 640 16

Page

Carter v. Atlanta St. A. B. R. Co., 338 U. S. 430, 94 L. Ed. 183, Adv. Op. No. 4, 70 S. Ct. 226 14

Central Vermont R. Co. v. White, 238 U.S. 507, 57 L. Ed. 1433, 35 S. Ct. 865 14

Chesapeake & O. R. Co. v. DeAtley, 241 U.S. 310, 60 L. Ed. 1016, 36 S. Ct. 564 14

Chicago R. I. & R. O. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. Ed. 477, 33 S. Ct. 250 15

City of Fort Worth v. Ware, 1 S.W. 2d 464 30

Cox v. Texas, 202 U.S. 446, 50 L. Ed. 1099, 26 S. Ct. 671 13

Dallas Ry. & Term. Co. v. Bishop, 153 S.W. 2d 298 26

Dallas Ry. & Term. Co. v. Boland, 53 S.W. 2d 158 30

Darden v. Denison, 3 S. W. 2d 137 (er. ref.) 30

Delaware City, S. & S. B. Nov. Co., v. Reybold, 142 U.S. 636, 35 L. Ed. 1141, 12 S. Ct. 290 16

Fenstermaker v. City of San Antonio, 29 S.W. 532 affirming 283 S.W. 883 25

Fox v. Dallas Hotel Co., 240 S. W. 517 31

Grand Rapids & I. R. Co. v. Butler, 159 U.S. 87, 40 L. Ed. 85, 15 S. Ct. 991 15

LIST OF AUTHORITIES—Continued

	Page
Gulf C. & S. F. Ry. Co. v. Younger, 29 S. W. 948 (er. ref.)	23
Gustafson v. American Land Co., 234 S.W. 244 affirmed in 249 S.W. 189	26
Hallaway v. Thompson, 226 S.W. 2d 816	11
Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, cert. den. 199 U.S. 609, 50 L. Ed. 332, 26 S. Ct. 750	24
Henwood v. Neal, 198 S. W. 2d 125	11
Hill v. Preston, 34 S. W. 2d 780, reversing 296 S. W. 925	25
Hillsborough Township v. Cromwell, 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445	17
Houston Printing Co. v. Hunter, 105 S. W. 2d 312 affirmed in 106 S. W. 2d 1043	23
Howard v. Howard, 102 S. W. 2d 473 (er. ref.)	31
Huddleston v. Dwyer, 332 U. S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015	17
Hutton v. Burkett, 18 S.W. 2d 740 (er. ref.)	23
Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 40 L. Ed. 467, 16 S. Ct. 344	15
Johnston v. Andrade, 54 S. W. 2d 1029	23

LIST OF AUTHORITIES—Continued

	Page
Johnson v. Risk, 137 U. S. 300, 34 L. Ed. 683, 11 S. Ct. 111	18
Kansas City Southern Ry Co. v. Chandler er. ref. 192 S.W. 2d 304 (ref. M. R. E.)	11
Kansas City Southern Ry. Co. v. Jones (1928) cert. gr. 275 U.S. 514, 72 L. Ed. 401, 48 S. Ct. 35; 276 U.S. 303, 72 L. Ed. 583, 48 S. Ct. 308, reversing 291 S. W. 528	9
Kennedy v. Wheeler, 268 S. W. 516 (wr .dis.)	30
Larkin v. Upton, 144 U. S. 19, 36 L. Ed. 330, 12 S. Ct. 614	31
Leonard v. Young, 186 S. W. 2d 81	31
Metzger Dairies v. Wharton, 113 S.W. 2d 675	23
Mexican Central Ry. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 13 S. Ct. 859	16
Minneapolis & St. L. R. Co. v. Bombolis, 24 U.S. 211, 60 L. Ed. 961, 36 S. Ct. 595	16
Missouri-Kansas & Tex. Ry. Co. v. Poole, 133 S. W. 239	23
M-K-T R. Co. v. Waddles, 203 S.W. 2d 350	11
Mulkey v. Allen, 36 S.W. 2d 198, reversing 19 S. W. 2d 936	25

LIST OF AUTHORITIES—Continued

	Page
Munger Automobile Club v. American Lloyds, 267 S. W. 304	30
New Orleans Ins. Asso. v. Piaggio, 83 U. S. 378, 21 L. Ed. 358	31
Northern Texas Traction Co. v. Singer, 34 S.W. 2d 920	30
Pecos N. T. R. Co. v. Rosenbloom (1916) 240 U. S. 439, 60 L. Ed. 730, 36 S. Ct. 390, reversing 173 S. W. 215	9
Rio Grande, E. P. & S. F. R. Co. v. Guzman, 214 S. W. 628	30
Robert Oil Corp. v. Garrett, 22 S. W. 2d 508 affirmed in 37 S. W. 2d 135	22, 23
Robins v. Connolly, 241 S. W. 244	23
Rust v. Rust, 117 S.W. 2d 59, modifying 88 S. W. 2d 787	23
San Antonio & A. P. Ry. Co. v. Bruihl, 240 S.W. 663	23
San Antonio & A. P. Ry. Co. v. Wagner (1916) 241 U. S. 476, 60 L. Ed. 1110, 36 S. Ct. 626, reversing 166 S. W. 24	9
Seaboard A. L. R. Co. v. Duvall, 225 U. S. 477, 56 L. Ed. 1171, 32 S. Ct. 790	14

Page

Sinclair Refining Co. v. Stevens, 123 Fed. 2d 186, cert. den. 315 U. S. 804, 86 L. Ed. 1203, 62 S. Ct. 632 24

Snipes v. Bomar Cotton Oil Co., 161 S. W. 1 23

Southern Pac. Co. v. Berkshire (1921) cert. gr. 250 U. S. 638, 63 L. Ed. 1183, 39 S. Ct. 494; 254 U. S. 415, 65 L. Ed. 335, 41 S. Ct. 162, reversing 207 S. W. 323 9

Sproles v. Rosen et ux, 47 S. W. 2d 331 affirmed in 84 S. W. 2d 1001 .....22, 23, 31

Stephenson v. Gaines, 298 S. W. 401 reversing 291 S. W. 602 26

T. & N. O. v. Conn, 30 S. W. 2d 939 23

T & N. O. v. Miller, 221 U. S. 408, 55 L. Ed. 789, 31 S. Ct. 534 17

Tex. & P. Ry. Co. v. Mix, 193 S. W. 2d 542 11

T. & P. Ry. Co. v. Smith, 183 S. W. 2d 182, reversed in 186 S. W. 2d 232 23

Travelers Ins. Co. v. Hobbs, 222 S.W. 2d 168 ..... 22, 23

Twachtman v. Connelly, 106 Fed. 2d 501 24

Tyrrell Hardware Co. v. Orgeron, 289 S.W. 1040 (er. ref.) 30

Page

United States v. Union Pacific R. Co., 169 Fed. 65 24

Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. Ed. 246, 28 S. Ct. 130 16

Victor American Fuel Co. v. Peccarich, 209 Fed. 568 31

Walker v. Houston Electric Co., 155 S.W. 2d 973 (er. ref.) 31

Walker v. New Mexico, 165 U.S. 593, 41 L. Ed. 837, 17 S. Ct. 421 31

Waters-Pierce Oil Co. v. Texas, 212 U.S. 112, 53 L. Ed. 431, 29 S. Ct. 227 16

Wilkerson v. McCarthy, 336 U. S. 53, 93 L. Ed. 497, 69 S. Ct. 413 14

STATUTES

Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 7

Judicial Code 28 U.S.C.A. Sec. 1257 7

RULES OF
UNITED STATES SUPREME COURT

Rule 38 Sec. 5 7

LIST OF AUTHORITIES—Continued

Page

TEXTS

38 Amer. Juris. p. 955, Sec. 263 24

41 Amer. Juris. p. 312, Sec. 33 24

Green, Judge and Jury p. 359 10

Speer, The Law of Special Issues in Texas p. 23 10

8 Tex. Juris. 10-yr. Supp. p. 231 Sec. 166 25

8 Tex. Juris. 10-yr. Supp. p. 283, Sec. 207 26

41 Tex. Juris. p. 1094, Sec. 270 31

41 Tex. Juris. p. 1225 Sec. 360 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.————

OLLIE B. ROBERTS, *Petitioner,*

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, *Respondent.*

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS AT DALLAS, TEXAS, AND BRIEF IN SUPPORT THEREOF

To the Honorable Supreme Court of the United States:

The Respondent, Missouri-Kansas-Texas Railroad Company of Texas, respectfully shows to the Court that the petition for Writ of Certiorari in this case should be denied for the reason that the opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

at Dallas, Texas (R. 327), reported in 225 S. W. 2d 198, correctly states the law in the case.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The opinion of the Court of Civil Appeals correctly and succinctly states the case and is here adopted.

Petitioner went to trial upon his first amended original petition and therein alleged six acts of negligence against Respondent. (R. 5)

The only factual statement contained in the pleading which furnished any information to Respondent was as follows:

> "That on said occasion, at approximately 5:00 o'clock, p.m., while said train was traveling at a high and excessive rate of speed, plaintiff was required to lean out of the doorway of said railway express and baggage car and throw a sack of newspapers onto the loading platform at Aubrey, Denton County, Texas. That as the plaintiff leaned out the doorway on said occasion, a large quantity of fine sand and small gravel was blown into his face and eyes, or some small object in the nature of sand struck him in his right eye." (R. 4)

These alleged acts of negligence, in brief, charged Respondent with negligence for the following reasons:

(1). In operating the train at a high and excessive rate of speed.

(2). In failing to cause the train to be stopped.

(3). In causing the train to be accelerated in speed.

(4). In causing the tracks to be sanded.

(5). In failing to furnish plaintiff with a cinder shield.

(6). In failing to equip the railway express car with a cinder shield. (R. 5).

Indeed, counsel for Petitioner, in his voire dire examination of the panel, stated to the jury that he expected to recover only because of respondent's failure to furnish and equip its baggage and express cars with a cinder shield, and no claim for recovery upon any other act of negligence was there made. (R. 32)

In his first amended original petition, Petitioner failed to allege that there had been any destruction or impairment of his earning capacity. Midway in the trial, the Court liberally permitted Petitioner to file his first trial amendment supplying these allegations, and Respondent, not being misled, thereby, made no complaint to the filing of such trial amendment. (R. 23).

After Respondent had excused all of its witnesses, twenty four hours after both parties had rested their case, and just before the case was submitted to the jury, petitioner filed a new pleading which he designated as his "First Amended Trial Amendment". (R. 32, 33, 34). In this pleading Petitioner repeated and adopted, in seria-

tum, the six numbered allegations of negligence above set forth, and then added the following general allegation, which bore no number:

> "That plaintiff at the time and on the occasion of his injuries was doing and performing his work by and in accordance with the methods adopted by the Missouri-Kansas-Texas Railroad Company of Texas for the conduct of its business. That in adopting such method for the conduct of its business, Missouri-Kansas-Texas Railroad Company of Texas was guilty of negligence." (R. 30, 31)

In addition, plaintiff also carried forward the allegations of his first trial amendment, concerning destruction and impairment of earning capacity.

Respondent thereupon promptly urged the following objections to the new allegation in the following language:

> "(1) The method adopted by the Missouri-Kansas-Texas Railroad Company of Texas in conducting its business, which is alleged to be negligence, is nowhere specified. Neither is any particular act of omission or commission alleged with any degree of definiteness and particularly so as to enable this defendant to adequately prepare its defense in the cause and to be prepared to submit evidence in contradiction of same, or to permit its counsel to argue the case intelligently and the jury to consider the same intelligently, but on the contrary same is so general, vague and indefinite that the entire gamut of the company's operations are brought into view, both by the pleadings and the issues to be submitted thereunder, consequently the defendant is unable to properly pre-

pare its defense or at this late date to argue the same in the presence of the jury, and of the foregoing exceptions the defendant prays judgment of the court.

"(2) The allegation in said trial amendment that the plaintiff was working in accordance with the methods adopted by the Missouri-Kansas-Texas Railroad Company of Texas in the conduct of its business and that such method for the conduct of its business was negligence and a proximate cause of plaintiff's injuries, is objectionable for the following reasons:

"(1) The same are a conclusion of the pleader.

"(2) The same is too vague, general and indefinite to apprise the defendant of the facts with which it will be confronted by the court's submission of this cause to the jury and therefore, said allegation does not meet the test of fair notice required by the Texas Rules of Civil Procedure, and in this respect the defendant calls the Court's attention that the allegation as pled is broad that it brings into review and runs the entire gamut of defendant's operations from the standpoint of location of its terminals, construction of its tracks, scheduling of its trains, employment and training of its personnel, the actual operation of its trains, the carrying of papers in its baggage and express cars, the discharge of its papers at nonstop stations, the speed of the train at the time of its discharging of the papers, the construction and design of its baggage cars and express cars, and in fact an indefinite number of other operations all of which come within the scope and breadth of the pleadings that same are so general and indefinite that this

defendant cannot properly prepare itself and could not have properly prepared itself at the inception of the trial, and certainly cannot prepare itself after the testimony has all been introduced and both parties have rested and closed some twenty-four hours before, and all defendant's witnesses have been excused and are no longer in attendance on the court.

"(3) The said pleadings are wholly immaterial and irrelevant to any issue in the case for the reason that it affirmatively and conclusively appears from the record that the operation of the train, and the construction and design of the baggage car in which the plaintiff was riding, was standard and conformed to the uniform practices, use and customs of railroad companies everywhere, and of the foregoing demurrers and exceptions, the defendant prays judgment of the court." (R. 34, 35, 36)

The Court overruled each and all of the foregoing objections to the allegations contained in the first amended trial amendment to which respondent excepted. (R. 37)

With the acquiescence of Petitioner, the court submitted only one of the specific acts of negligence alleged, namely, the failure of Respondent to equip its baggage car with a cinder shield, and *upon this issue the jury acquitted Respondent of any negligence.*

In addition, the Court submitted the general issue, which petitioner had alleged in his belated trial amendment, and the jury convicted Respondent of negligence

in the adopting of such methods of work for the conduct of its business. (R. 70)

To the submission of these issues, Respondent vigorously objected. (R. 88, 89)

By prolix and expansive language, petitioner attempts to construct his case upon the difference between the dispatch of mail pouches from railway postal cars and railway baggage and express cars. The Court of Civil Appeals found the only difference was that no baggage car had a cinder shield or bar protector, while railway postal cars were so equipped. (R. 329)

NO BASIS FOR JURISDICTION

A.

Petitioner claims that the jurisdiction of this court is based upon non-existent paragraph (b) of Section 344 of Title 28 of the Judicial Code. There has been no infringement herein upon any right, privilege or immunity within the purview of the Federal Employer's Act, 45 U.S.C.A. 51, and hence there is no jurisdictional basis for its reception by this court under Section 1257 of Title 28 of the Judicial Code. 28 U.S.C.A. 1257.

B.

Certainly no jurisdiction obtains under paragraph (a), of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States. No state court below

construed the Federal Employers' Liability Act. Nothing has transpired in this cause contrary to the applicable decisions of this court unless the right of a plaintiff to recover under the Act has grown in stature until it has, ipso facto, become a federal question of substance. The sole question at issue is one of local practice and procedure.

C.

The first paragraph on page 8 of the petition contains a distillation of all of petitioner's contentions. The fanciful contention, that each involves an invasion of a Federal right, will be more properly dealt with in the accompanying brief.

D.

The opinion of the Court of Civil Appeals does not conflict with any of the cases cited by petitioner but, on the contrary, is consonant with the rules of decision announced and followed by the courts of the federal system.

NO REVIEWABLE QUESTIONS PRESENTED

This court cannot fail to appreciate that the questions presented by petitioner involve no matters of "importance to the operation of our federal system", but on the contrary disclose that this case involves "no more than its particular facts", consisting wholly of matter of local practice.

UNTENABLE REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioner contends that this writ should be granted because this Court has never written an opinion upon a case arising under the Federal Employers' Liability Act from the State Courts of Texas. If petitioner means the Supreme Court of the United States, then his unfamiliarity with the decisions of the court is self evident. *San Antonio & A. P. Ry. Co. v. Wagner*, (1916), 241 U. S. 476, 60 L. Ed. 1110, 36 S. Ct. 626, reversing 166 S.W. 24; *Pecos & N. T. R. Co. v. Rosenbloom*, (1916), 240 U.S. 439, 60 L. Ed. 730, 36 S. Ct. 390, reversing 173 S. W. 215; *Southern Pac. Co. v. Berkshire* (1921) cert. gr. 250 U. S. 638, 63 L. Ed. 1183, 39 S. Ct. 494; 254 U. S. 415, 65 L. Ed. 335, 41 S. Ct. 162 reversing 207 S. W. 323; *Kansas City Southern Ry. Co. v. Jones* (1928) cert. gr. 275 U.S. 514, 72 L. Ed. 401, 48 S. Ct. 35; 276 U. S. 303, 72 L. Ed. 583, 48 S. Ct. 308 reversing 291 S. W. 528; *Atchison, T & S. F. Ry. Co. v. Saxon* (1932) cert. gr. 284 U. S. 604, 76 L. Ed. 518, 52 S. Ct. 30; 284 U. S. 458, 76 L. Ed. 397, 52 S. Ct. 229 reversing 36 S. W. 2d 228.

If he means this Court, as presently constituted, then the implication should occasion a universal concern more recently voiced in the dissenting opinions of individual members.

Implying that the reversal below was based upon lack or insufficiency of the evidence, petitioner contends that

the Court of Civil Appeals usurped the function of the jury, for which a writ of certiorari should issue. This contention is erroneous and is most effectively refuted by reading the opinion of the Court of Civil Appeals. A jury trial was had and no question as to the sufficiency or insufficiency of the evidence is at issue.

Petitioner advances the view that a writ should issue because of the difficulty inherent is submitting and sustaining a general conclusion, in a jurisdiction where special issue submission of ultimate fact issues obtains.

Plaintiff was treated "exactly as are plaintiffs who press like claims under State law". *If petitioner desired a loose, general submission, then he should have brought his suit in the Federal Court. He complains of the practice in the State court, but he chose the forum.*

The Texas practice of special issue submission "is most perfectly patterned." (Green, Judge and Jury p. 359) It has been conceded that "The Texas courts perhaps try more cases upon special issues than do the courts of any of the other states,—many times more." (Speer, The Law of Special Issues in Texas, p. 23) The evolutionary process has developed a complete and comprehensive body of jurisprudence. Petitioner here seeks, through the intervention of this Court, under the guise of seeking uniformity in and protection of federal rights, to pervade that system of practice and procedure, with exception, confusion and uncertainty.

With a callous indifference, petitioner charges that the appellate courts of Texas are tainted with an antipathy for the Federal Employers' Liability Act. To the contrary, their decisions reveal a full awareness of the nature and scope of the rights and obligations arising under the act as well as a conscientious effort to follow the rennovated decisions of this court. *Kansas City Southern Ry. Co. v. Chandler*, (er. ref. n. r. e.) 192 S. W. 2d 304; *Texas & P. Ry. Co. v. Mix*, 193 S. W. 2d 542; *Henwood v. Neal*, 198 S. W. 2d 125; *MKT R. Co. v. Waddles*, 203 S. W. 2d 350; *Hallaway v. Thompson*, 226 S. W. 2d 816.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

Ralph Elliott

Ralph Elliott
Counsel for Respondent

OF COUNSEL:

G. H. PENLAND
General Solicitor
Missouri-Kansas-Texas Railroad Company
Katy Building
Dallas, Texas

BURFORD, RYBURN, HINCKS AND FORD
Interurban Building
Dallas, Texas

FREELS & ELLIOTT
207-09 Commercial Bldg.
Sherman, Texas

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.————

OLLIE B. ROBERTS, *Petitioner*,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, *Respondent*.

BRIEF IN SUPPORT OF RESPONDENT'S ANSWER TO PETITIONER'S WRIT OF CERTIORARI

CHALLENGE TO THE GROUNDS OF JURISDICTION

Any careful perusal of the opinion of the Court of Civil Appeals will disclose that no federal question was decided by that court. Mere reference to a federal question, in the assignments of error in the State appellate court, and in this court, are not sufficient, if it does not appear that the State court dealt with the question. *Cox v. Texas*, 202 U. S. 446, 50 L. Ed. 1099, 26 S. Ct. 671. Certainly, it

ought to be specifically shown that a question concerning the proper construction of the Federal Employers' Act was involved and "the judicial mind of the court exercised thereon". *Seaboard A. L. R. Co. v. Duvall*, 225 U. S. 477, 56 L. Ed. 1171, 32 S. Ct. 790.

No question of importance to the public or to the Federal system, as distinguished from that of the parties, is here involved. Only added confusion to an already confused field of law could follow from the improvident grant of a writ. A reversal would set uncertainty loose to stalk through state practice and procedure in Texas. Only its own unique circumstances are involved in this case. The issues here involved do not meet the qualifications, which this court has laid down for itself. See dissenting opinions of Mr. Justice Frankfurther in *Brown v. Western Railway of Alabama*, 338 U. S. 294, 94 L. Ed. 97, Adv. Op. No. 2, 70 S. Ct. 104, *Wilkerson v. McCarthy*, 336 U. S. 53, 93 L. Ed. 497, 69 S. Ct. 413, *Carter v. Atlanta St. A. B. R. Co.*, 338 U. S. 430, 94 L. Ed. 183 Adv. Op. No. 4, 70 S. Ct. 226, and of Mr. Justice Jackson in *Affolder v. New York, C. & St. L. R. Co.*, —— U. S. ——, 94 L. Ed. 439, Adv. Op. No. 10, 70 S. Ct. 509.

Only questions of local practice and procedure and settled rules of construction are here involved. This court has not yet abrogated their application in the trial of these cases in State courts. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016, 36 S. Ct. 564. The thought

of the court expressed in *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 40 L. Ed. 467, 16 S. Ct. 344, is true here:

> "It is manifest that it was never contemplated by framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of the state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy before it that the averments of an answer set forth no defense to the claim of the plaintiff."

In *Central Vermont R. Co. v. White*, 238 U. S. 507, 57 L. Ed. 1433, 35 S. Ct. 865, it was held that assignments, relating to matters of pleading, to the admissibility of evidence and to the sufficiency of exceptions, were not reviewable in a suit under the Act. In *Chicago, R. I. & R. O. R. Co. v. Schwyhart*, 227 U. S. 184, 57 L. Ed. 477, 33 S. Ct. 250, an injury suit against the railroad and its servants, a petition for removal was filed alleging fraudulent joinder. After its denial, an additional allegation against the servant was added and the court there, significantly, said:

> "The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come."

In *Grand Rapids & I. R. Co. v. Butler*, 159 U.S. 87, 40 L. Ed. 85, 15 S. Ct. 991, it was held the conclusion of the

state court, that the pleadings were sufficient to permit of the examination of the point upon which its decision turned, was a matter of local practice, which could not be reviewed. In *Mexican Central Ry. Co. v. Pinkney*, 149 U.S. 194, 37 L. Ed. 699, 13 S. Ct. 859, the court announced it was well settled that mere matters of procedure such as the granting and refusing of motions for new trial, and questions respecting amendments to the pleadings were local questions, not reviewable by this court. This court, likewise, held that the construction of a pleading and the meaning of its various allegations are matters of local practice and not subject to review in *Vandalia R. Co. v. Indiana*, 207 U.S. 359, 52 L. Ed. 246, 28 S. Ct. 130. See also *Carr v. Nichols*, 157 U.S. 370, 39 L. Ed. 736, 15 S. Ct. 640. In *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 60 L. Ed. 961, 36 S. Ct. 595, involving a suit under the Federal Act, the court held that giving effect to local statutes providing for less than twelve jurors, were matters of local practice and procedure and not reviewable; and so, likewise, did the court so hold concerning the appointment of a receiver and in the disregard of a supersedeas bond in *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112, 53 L. Ed. 431, 29 S. Ct. 227. In *Delaware City, S. & S. B. Nov. Co. v. Reybold*, 142 U.S. 636, 35 L. Ed. 1141, 12 S. Ct. 290, the complaint contained two counts, to the first of which the anti-assignment statute was pleaded. The jury returned a verdict without specifying the count under which the damages

were assessed and the court construed the recovery to be under the second count. This court, there held that such a construction related only to the local practice and procedure and was not subject to review.

In *Texas & N. O. R. Co. v. Miller*, 221 U.S. 408, 55 L. Ed. 789, 31 S. Ct. 534, plaintiff's complaint was defective in failing to plead a Louisiana statute, upon which recovery was predicated, for death of an engineer. The Texas Court of Civil Appeals held that this deficiency was cured by the allegations in the answer. This court held that the Texas court was simply giving effect of a generally recognized rule of construction, involving nothing but a question of pleading and practice in the Texas courts, and that such decision was final and not reviewable.

The record in this cause has been before the Court of Civil Appeals, composed of three judges, and the Supreme Court of the State of Texas, composed of nine judges, and this Court is now asked to overturn the conscientious conclusions arrived at by twelve judges, all of whom are well versed in the rules of local practice and procedure in Texas.

This court has repeatedly professed to "pay great deference to the views of the judges of those courts 'who are familiar with intricacies of local law and practice'." *Hillsborough Township v. Cromwell*, 326 U.S. 620, 90 L. Ed. 358, 66 S. Ct. 445; *Huddleston v. Dwyer*, 322 U.S.

232, 88 L. Ed. 1246, 64 S. Ct. 1015. If this be true, then *certainly all the Court of Civil Appeals has done under well recognized rules of construction is "conscientiously to apply its understanding of what is necessary to set forth a claim of negligence according to the local requirement of particularity" and as well in the submission of special issues.* Dissenting opinion of Mr. Justice Frankfurter in *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 94 L. Ed. 97, Adv. Op. No. 2, 70 S. Ct. 105.

It is respectfully submitted that this court ought not to here assume jurisdiction by "resort to critical conjecture". *Johnson v. Risk*, 137 U.S. 300, 34 L. Ed. 683, 11 S. Ct. 111.

CONCISE STATEMENT OF THE CASE

Respondent's statement of the case set forth in the foregoing petition is adopted here.

COUNTER POINTS PRESENTED AND ARGUMENT SUMMARY OF ARGUMENT

1. The Court of Civil Appeals did not err in holding that petitioner's general allegation of negligence as contained in his trial amendment, was confined by the specific allegations of negligence alleged and subject to the objections urged against it.

A. Petitioner received a fair impartial jury trial upon his trial petition, containing appropriate

specific allegations of negligence under Texas practice.

B. The general charge of negligence, first made after the trial was over, was a conclusion, which was restricted and controlled by the specific allegations of negligence.

C. The Court of Civil Appeals in so holding properly followed unquestioned rules of construction.

II. The Court of Civil Appeals did not err in holding that the general charge of negligence, found by the jury, was controlled by the specific issues of negligence found by the jury and subject to the objections urged against it.

A. The Court of Civil Appeals did not misquote the jury's findings.

B. Petitioner's assertions of error, concerning the sufficiency and review of the evidence are predicated a priori upon the unjustified assumption that the pleadings and issues otherwise warranted a recovery.

C. The general issue of negligence was an unauthorized conclusion which was restricted and controlled by the specific allegations of negligence.

D. The Court of Civil Appeals in so holding properly followed unquestionable rules of construction.

COUNTER POINTS OF ERROR

Because petitioner's specifications of error with characteristic evasiveness, are compounded of erroneous and unwarranted assumptions, not present in the record, respondent cannot submit converse specifications thereto. Respondent does, however, desire to offer as counter points the two grounds upon which the decision of the Court of Civil Appeals is based.

COUNTER POINT OF ERROR NO. 1

The Court of Civil Appeals did not err in holding that petitioner's general allegation of negligence was confined by the specific allegations of negligence alleged and subject to the objections urged against it.

COUNTER POINT OF ERROR NO. 2

The Court of Civil Appeals did not err in holding that the general charge of negligence found by the jury was controlled by the specific issues of negligence found by the jury and subject to the objections urged against it.

COUNTER POINT OF ERROR NO. 1

The Court of Civil Appeals did not err in holding that petitioner's general allegation of negligence was confined by the specific allegations of negligence alleged and subject to the objections urged against it.

ARGUMENT UNDER COUNTER POINT NO. 1

Petitioner's brief is replete with vague abstractions alluding to his deprivation of a jury trial. The record, however, reveals that petitioner had a fair impartial jury trial.

His first amended original petition upon which he went to trial revealed six specific charges of negligence against respondent. The record discloses that petitioner was accorded liberal treatment in offering all of the evidence he desired, in support of these specific allegations of negligence. Petitioner makes no complaint that he was not given a free hand in making his proof before the jury.

Although petitioner has freely plucked language from its context of facts in *Brown v. Western Railway of Alabama*, 94 L. Ed. 93, Adv. Sheet No. 2, that case is no authority here. The Court there simply held that the complaint of petitioner, Brown, contained allegations sufficient to authorize the introduction of proof thereunder before the jury. Petitioner here was given that right.

With great liberality, petitioner was permitted to amend his complaint, when the trial was half over, and supply a complete omission in his pleading—allegations of destruction and impairment of petitioner's earning capacity. To this action respondent raised no objection.

After all of the evidence was concluded, 24 hours after both sides had closed their case and after all of respondent's witnesses had been excused, plaintiff filed a new

pleading which he designated as his "first amended trial amendment". In this amendment, he repeated and adopted in seriatum the six numbered, specific allegations of negligence of his complaint and then added a general allegation and charge which bore no number, reading as follows:

> "That plaintiff at the time and on the occasion of his injuries was doing and performing his work in accordance with the methods adopted by the Missouri-Kansas-Texas Railroad Company of Texas for the conduct of its business. That in adopting such method for the conduct of its business, the defendant Missouri-Kansas-Texas Railroad Company of Texas was guilty of negligence." (R. 30, 31)

To this new and general, ambiguous allegation, respondent promptly and vigorously objected. (R. 34) This action of the trial court, under Texas practice, was error committed against respondent and in favor of petitioner, to which he has not alluded. The trial court should not have permitted the amendment to be filed nor any issues submitted thereunder. *Travelers Insurance Company v. Hobbs*, 222 S.W. 2d 168.

The allegation complained of did not furnish the slightest indication to Respondent of the particular act of negligence sought to be charged against it. It was patently a conclusion of the pleader which under many decisions of the Texas Courts was objectionable. *Alamo Mills Company v. Hercules Iron Works*, 22 S.W. 1097; *Robert Oil Corp. v. Garrett*, 22 S.W. 2d 508; *Sproles v. Rosen, et ux,*

47 S.W. 2d 331, affirmed in 84 S.W. 2d 1001; *T. & N. O. v. Conn*, 30 S.W. 2d 939; *San Antonio & A. P. Ry. Co. v. Bruihl*, 240 S.W. 663; *Snipes v. Bomar Patton Oil Co.*, 161 S.W. 1; *Hutton v. Burkett*, 18 S.W. 2d 740 (er. ref.); *Robins v. Connolly*, 241 S.W. 244; *Missouri-Kansas & Texas Ry. Co. v. Poole*, 133 S.W. 239.

Respondent pursued the only route available to avoid the vice which resulted in the submission of the issue based thereon—by exception intelligibly and concisely pointing out the defects and insufficiency in the general conclusion. *Rust v. Rust*, 117 S.W. 2d 59, modifying 88 S.W. 2d 787.

By a long, unbroken line of decisions, the Courts of Texas have held that general allegations of negligence are limited, subordinated to and controlled by specific allegations of negligence and that, if a plaintiff under such circumstances recovers at all, it must be upon the specific act or acts of negligence and not upon the general. *Bateman v. Cleghorn*, 266 S.W. 422; *Robert Oil Corporation v. Garrett*, 22 S.W. 2d 508, affirmed in 37 S.W. 2d 135; *Sproles v. Rosen*, 47 S.W. 2d 331, affirmed in 84 S.W. 2d 1001; *Johnston v. Andrade*, 54 S.W. 2d 1029; *Gulf C. and S. F. Ry. Co. v. Younger*, 29 S.W. 948 (er. ref.); *Houston Printing Company v. Hunter*, 105 S.W. 2d 312, affirmed in 106 S.W. 2d 1043; *Metzger Dairies v. Wharton*, 113 S.W. 2d 675; *T. & P. Ry. Co. v. Smith*, 183 S.W. 2d. 182, reversed in 186 S.W. 2d 232.

This rule of construction is widely recognized in the text books, 38 Amer. Juris., Page 955, Sec. 263; 41 Amer. Juris. Page 312, Sec. 33.

The Court, in *United States v. Union Pacific R. Co.*, 169 Fed. 65, announced the same rule in the following language:

> *"It is familiar principle of pleading and one repeatedly recognized by this court that a general averment is controlled and limited by specific allegations on the same subject matter."*

This rule of construction has been firmly and long adhered by the Federal Courts. Hayes-Young Tie Plate Company v. St. Louis Transit Company, 137 Fed. 80, cert. den., 199 U.S. 609; 50 L. Ed. 332, 26 Sup. Ct. 750; *Boatman's Bank v. Fritzlen*, 135 Fed. 650, cert. den., 198 U.S. 586, 49 L. Ed. 1174, 25 Sup. Ct. 803; *Sinclair Refining Company v. Stevens*, 123 Fed. 2d 186, cert. den., 315 U.S. 804, 86 L. Ed. 1203, 62 S. Ct. 632; *Twatchtman v. Connelly*, 106 Fed. 2d 501.

Petitioner nowhere claims that this general allegation was not a pure conclusion of the pleader nor that it should not have been controlled and limited by the specific allegations of negligence which he made. He simply takes the rule of construction, which the court applied to the pleading, and chameleon-like proceeds to convert it, for purposes of argument, into an appellate rule for the construction of evidence. Like other assumptions made by

petitioner, it is without support in the record. In 8 Tex. Juris., 10-yr. supp., page 231, sec. 166, the rule of interpretation followed was stated as follows:

> "However, when, after applying a liberal rule of construction, the underlying factual premises cannot be definitely and certainly found either by inference or implication, such pleading may be subject to such exception, pointing out that particular insufficiency intelligibly and with particularity."

Petitioner repeatedly directs chafing remarks against the courts of Texas, and the Court of Civil Appeals in particular, for improper rules of construction applied to the evidence upon appeal. He thus completely side steps and omits any discussion of whether his pleading of a general conclusion of negligence was properly construed by the Court of Civil Appeals. *The construction was that of a pleading, not of the evidence.*

The Courts of Texas have never been unduly stringent in rules of pleading. Throughout the history of Texas jurisprudence, the appellate courts of Texas have always reviewed questions of pleading with liberality in order to sustain them. *Black v. Drury*, 24 Tex. 289. When the office of general demurrer was recognized in Texas, the rule was that every reasonable intendment would be indulged in favor of the sufficiency of a pleading as against a general demurrer. *Fenstermaker v. City of San Antonio*, 290 S.W. 532, affirming 283 S.W. 883; *Mulkey v. Allen*, 36 S.W. 2d 198, reversing 19 S.W. 2d 936; *Hills v.*

Preston, 34 S.W. 2d 780, reversing 296 S.W. 925; *Stephenson v. Gaines*, 298 S.W. 401, reversing 291 S.W. 602. But when special exceptions have been leveled against the pleading, the allegations to which the exceptions are directed are construed most strongly against the pleader. *Gustafson v. American Land Company*, 234 S.W. 244, affirmed in 249 S.W. 189; *Dallas Railway and Terminal Company v. Bishop*, 153 S.W. 2d 298, 8 Texas Juris., 10 yr. Supp., page 283, Sec. 207.

It is respectfully submitted that the Court of Civil Appeals correctly construed the catch-all allegation. *The jury having found against petitioner upon his only specific fact issue, he cannot now be heard to complain.*

COUNTER POINT OF ERROR NO. 2

The Court of Civil Appeals did not err in holding that the general charge of negligence found by the jury was controlled by the specific issues of negligence found by the jury and subject to the objections urged against it.

ARGUMENT UNDER COUNTER POINT OF ERROR NO. 2

Throughout his brief, petitioner has consistently charged that the Court of Civil Appeals mis-quoted the findings of the jury and, consequently, enlarged upon them. A careful reading of the charge of the court in connection with the opinion of the Court of Civil Appeals fails to reveal any basis for petitioner's charge.

Referring to the allegations of plaintiff's petition the Court of Civil Appeals said:

> "There allegations in brief charged negligence:
>
> (1). In operating its train at a high and excessive rate of speed;
>
> (2). In failing to cause the train to be stopped;
>
> (3). In causing the train to be accelerated in speed;
>
> (4). In causing the track to be sanded;
>
> (5). In failing to furnish plaintiff with a cinder shield;
>
> (6). In failing to equip the railroad baggage car with a cinder shield." (R. 331)

There appears to be no appreciable difference between the statement of these allegations of negligence and those shown by the record in plaintiff's first amended original petition. (R. 5)

The Court of Civil Appeals noted that petitioner, in his belated trial amendment, made the additional general allegation:

> "That the plaintiff at the time and on the occasion of his injuries 'was doing and performing his work by and in accordance with the methods adopted by the Missouri-Kansas-Texas Railroad Company of Texas for the conduct of its business; that in adopting such method for the conduct of its business, the defendant, Missouri-Kansas-Texas Railroad Company of Texas was guilty of negligence' and such negligence was a proximate cause of plaintiff's injury and damage." (R. 329)

The record fails to reveal any variance between the allegations quoted by the Court of Civil Appeals and those contained in the trial amendment. (R. 31)

The jury found in the affirmative upon such issue No. 5A reading:

> "Do you find from a preponderance of the evidence that at the time plaintiff sustained his injuries, if any, and on the occasion in question, Ollie B. Roberts was doing his work by the methods adopted by the Missouri-Kansas-Texas Railroad Company of Texas, for the conduct of its business." (R. 55)

The jury likewise found in the affirmative on Special Issue No. 5B reading as follows:

> "Do you find from a preponderance of the evidence that the adopting of such methods for the conduct of its business, if you have so found, was negligence, as that term has been defined to you herein". (R. 55, 56)

The Court of Civil Appeals in its opinion said:

> "The court overruled defendant's special exceptions and the cause being tried to a jury submitted issues in conformative with plaintiff's pleading in connection with the jury, found that the defendant was not guilty in failing to equip the baggage car in question with a cinder shield; that the defendant was guilty of negligence in the 'methods adopted for the conduct of its business' and to the ancillary issues that such negligence was a proximate cause of plaintiff's injuries."

Respondent is unable to perceive the point which petitioner, by sheer verbosity, attempts to make between "the adopting of such methods for the conduct of its business" and the "methods adopted for the conduct of its business". A careful reading of the entire opinion fails to reveal otherwise. From all that respondent can observe, it is a case of twiddle-dum and twiddle-dee.

Petitioner complains glibly of error, on the part of the Court of Civil Appeals, in appraising and construing the sufficiency of the evidence, and while no erroneous recitation of the evidence is disclosed in the record, the real point to which petitioner is completely blind is the controlling effect of the specific allegations of negligence and the specific findings of the jury contra-distinguished from the general charge of negligence.

The Court of Civil Appeals in its opinion found that the only difference between the "handling of ordinary mail pouches in RPO cars and in combination baggage and mail cars is that no baggage car has cinder shields or bar protector whilst RPO cars are so equipped." (R. 329)

The petitioner has not contended that this was not correct, but says that the Court of Civil Appeals has confused the methods of doing petitioner's work with the equipment provided on respondent's trains. While this discussion is immaterial to the point at issue, it is not amiss to point out that solely by vague, conglomerate

phrasing, petitioner seeks to synthesize from the evidence a complex distinction between the act of a railway postal employee and that of a baggage clerk in casting a mail pouch through an open door from a moving train. Skinned of its wordiness, petitioner's brief is undressed to reveal a contention of inconsequence in that railway postal clerks looked from the mail car only once before kicking the pouch from the train with their feet, while the baggage employees looked twice before throwing the pouch off with their hands. (Petitioner's Brief, pages 20, 21). Even that attempted distinction is further denuded by the record, since, on the occasion of his complaint, petitioner looked from the car only once. (R. 107, 137, 138).

The general catch-all issue of negligence which the court submitted to the jury was an indefinite conclusion of the pleader and affords no basis for a judgment under the rules of practice in Texas. *City of Ft. Worth v. Ware*, 1 S.W. 2d 464; *Kennedy v. Wheeler*, 268 S.W. 516 (wr. dis.); *Rio Grande, E. P. & S. F. R. Co. v. Guzman*, 214 S.W. 628; *Tyrrell Hardware Co. v. Orgeron*, 289 S.W. 1040 (er. ref.); *Munger Automobile Club v. American Lloyds*, 267 S.W. 304; *Northern Texas Traction Co. v. Singer*, 34 S.W. 2d 920; *Darden v. Denison*, 3 S.W. 2d 137 (er. ref.); *Dallas Ry. & Term. Co. v. Boland*, 53 S.W. 2d 158.

It is a well settled rule of practice in Texas that specific findings of fact and negligence control, limit and super-

sede general findings of fact and negligence and that the general findings should be disregarded. Sproles v. Rosen, 84 S.W. 2d 1001; *Fox v. Dallas Hotel Company,* 240 S.W. 517; *Bragg v. Hughes,* 53 S.W. 2d 151; *Howard v. Howard,* 102 S.W. 2d 473 (er. ref.); *Walker v. Houston Electric Company,* 155 S.W. 2d 973 (er. ref.); *Leonard v. Young,* 186 S.W. 2d 81; *Benson v. Missouri-Kansas & Texas R. Co.,* 200 S.W. 2d 233 (cert. den.); 332 U.S. 830, 92 L. Ed. 403, 68 S. Ct. 206. See also cases cited at 41 Tex. Juris., page 1094, Sec. 270 and page 1225, Sec. 360.

This Court, in *New Orleans Insurance Association v. Piaggio,* 83 U.S. 378, 21 L. Ed. 358, had occasion to say:

> "Courts also in the trial of the issues of fact often propound questions to a jury and the rule is well settled that such a spcial finding even when it is inconsistent with the general verdict shall control in determining what judgment shall be rendered in the case."

This court and other federal courts, in a climate adapted to the general charge, have long held that specific findings when submitted to and found by a jury will delimit and control any general findings in the general charge. Larkin v. Upton, 144 U.S. 19, 36 L. Ed. 330, 12 S. Ct. 614; *Walker v. New Mexico,* 165 U.S. 593, 41 L. Ed. 837, 17 S. Ct. 421; *Victor American Fuel Co. v. Peccarich,* 209 Fed. 568.

It is respectfully contended that petitioner's catch-all conclusion of negligence was superseded by the specific

issue upon which he sought recovery, and the jury having found adversely upon such specific issue, he is in no position to complain.

CONCLUSION

It is respectfully submitted that for the many reasons herein urged, the petition for writ of certiorari ought to be denied.

Respectfully submitted,

Ralph Elliott

Ralph Elliott
Counsel for Respondent

OF COUNSEL:

G. H. PENLAND
General Solicitor
Missouri-Kansas-Texas Railroad Company
Katy Building
Dallas, Texas

BURFORD, RYBURN, HINCKS AND FORD
Interurban Building
Dallas, Texas

FREELS & ELLIOTT
207-09 Commercial Bldg.
Sherman, Texas

Contemporaneously with the mailing of the foregoing answer and brief to the clerk of The Supreme Court of the United States, a copy of this brief has been furnished to Mr. Neilson Rogers of Sherman, Texas, Counsel for Petitioner, Ollie B. Roberts.

Ralph Elliott